

ORIGINAL**FILED****07 FEB -9 PM 4: 28**CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

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19 Attorneys for Defendant Foley & Lardner LLP

20 UNITED STATES DISTRICT COURT
 21 SOUTHERN DISTRICT OF CALIFORNIA

22 VAXIIION THERAPEUTICS, INC.,

23 Plaintiff,

24 vs.

25 FOLEY & LARDNER LLP and DOES 1 through
 26 20, inclusive,

27 Defendants.

28 '07 CV 280 IEG (RBB)
 Case No. _____

NOTICE OF REMOVAL OF CIVIL
 ACTION TO THE UNITED STATES
 DISTRICT COURT
 [28 U.S.C. §§ 1441 AND 1338]

[SDSC Case No. GIC877641]



1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
2 DISTRICT OF CALIFORNIA:

3 PLEASE TAKE NOTICE that defendant Foley & Lardner ("Defendant") hereby removes the
4 above-entitled action from the Superior Court of the State of California for the County of San Diego
5 ("S.D. Superior Court") to the United States District Court for the Southern District of California
6 pursuant to 28 U.S.C. §§ 1338(a) and 1441(a)

7 1. On December 28, 2006, plaintiff Vaxiion Therapeutics, Inc. filed a complaint in the
8 S.D. Superior Court entitled *VAXIION THERAPEUTICS, INC. v. FOLEY & LARDNER LLP, et al.*,
9 Case No. GIC877641 (the "Complaint"). True and correct copies of all state court pleadings and
10 process served on or by Defendant to date are attached hereto as Exhibits A & B, pursuant to
11 28 U.S.C. § 1446(a).

12 2. Defendant was served with the complaint on January 11, 2007. Consequently, this
13 Notice of Removal is timely filed.

14 3. Plaintiff sues Defendant for (1) negligence; (2) dual representation of adverse interests;
15 (3) breach of contract; (4) interference with prospective economic advantage; and (5) constructive
16 fraud. *See* Exhibit A, at pp. 4-6.

17 4. Plaintiff retained Defendant to prosecute a provisional patent application which
18 Defendant drafted and filed in the United States Patent and Trademark Office on behalf of Plaintiff on
19 May 24, 2001. *See* Exhibit A, at pg. 2. Defendant filed a second, and expanded, provisional U.S.
20 application on behalf of Plaintiff on February 25, 2002, claiming priority to the earlier May 24, 2001
21 U.S. provisional application. *See* Exhibit A, at pg. 2. Plaintiff also requested that Defendant file an
22 international patent application under the Paris Cooperation Treaty ("PCT") based on the U.S.
23 provisional applications. *See* Exhibit A, at pg. 2. Plaintiff alleges that Defendant failed to exercise
24 reasonable care and skill by filing Plaintiff's PCT application after the one year deadline imposed by
25 the PCT under which the PCT application could claim priority back to the May 24, 2001 U.S.
26 provisional application filing date. *See* Exhibit A, at pg. 2. Plaintiff further alleges that, as a result of
27 Defendant's failure to exercise reasonable care, an Australian-based company, EnGene, "applied for
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1 and has received a positive office action on the PCT patent regarding Plaintiff's technology" resulting
2 in damage to Plaintiff. *See* Exhibit A, at pg. 4.

3 5. This case may be removed under 28 U.S.C. §§ 1338(a) and 1441(a) for the following
4 reasons:

- 5 a. Plaintiff's claims are based on the patentability and priority dates, if any, of the
6 applications Defendant filed on Plaintiff's behalf, and therefore "the cause of
7 action or . . . plaintiff's right to relief necessarily depends on resolution of a
8 substantial question of federal patent law, [and] in that patent law is a necessary
9 element of one of the well-pleaded claims." *See Christianson v. Colt Indus.*
10 *Operating Corp.*, 486 U.S. 800, 808-809 (1988) (citations omitted).
- 11 b. Plaintiff's claims involve allegations that Defendant failed to timely file a patent
12 application, and that such conduct amounts to negligence. The determination of
13 such a claim gives rise to a question of federal patent law. *Grote Approach, Ltd.*
14 *v. Reynolds*, No. 3:04-CV-2735-BF, 2005 U.S. Dist. LEXIS 16362, *1
15 (N.D. Tex. Aug. 9, 2005).
- 16 c. To prove its case Plaintiff must show that, but for Defendant's alleged
17 negligence, it would have been awarded a valid and enforceable patent, if
18 anything. As such, the prosecution of the application that would have resulted
19 in a valid and enforceable patent, if anything, will be at issue in this case. The
20 scope, validity and enforceability of a patent are substantial questions of federal
21 (and international) patent law. *See Air Measurement Techs., Inc., v. Hamilton,*
22 *Hamilton & Terrile, LLP.*, No. SA-03-CA-0541-RF, 2003 U.S. Dist. LEXIS
23 16391, *13 (W.D. Tex. Sept. 5, 2003).
- 24 d. Plaintiff alleges that, due to Defendant's failure to exercise reasonable care and
25 skill, the EnGene patent applications interfere with the patentability, if any, of
26 Plaintiff's PCT application and its related patent applications and patents, if any.
27 To resolve this issue, the Court will have to construe and compare the relevant
28 claims of the EnGene patent application with the properly construed relevant

1 claims of Plaintiff's PCT application and its related patent applications and
2 patents, if any. The construction of patent claims gives rise to a question of
3 federal (and international) patent law.

4 6. The existence of a single removable claim allows removal of the entire action.
5 28 U.S.C. 1441(c); *National Audubon Soc'y v. Dept. of Water & Power*, 496 F. Supp. 499, 509
6 (E.D. Cal. 1980).

7 7. Notice of this removal will be filed with the state court and provided to all adverse
8 parties pursuant to 28 U.S.C. § 1446(d).

9 This removal is based on this Notice of Removal to the United States District Court, the
10 complete file in the state court case, and any other matters which the Court deems applicable.
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12 Dated: February 9, 2007

Respectfully submitted,

13 HOWREY LLP

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15 By: 

16 Scott B. Garner
17 Attorneys for Defendant
18 Foley & Lardner LLP

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Attorncys for Plaintiff
 VAXIION THERAPEUTICS, INC.

SAN DIEGO SUPERIOR COURT
 Date 12-29-06 Oper Ed JRM
 Case No. SIC877641
 Receipt No. 024611-32319
 Trans Type AF
 Allocations Amount
 SE 320.00
 Total Allocated 320.00
 Vendor CK Amt 320.00
 Tender Amt
 Total Amt Paid 320.00
 Change Due 0.00

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF SAN DIEGO

VAXIION THERAPEUTICS, INC.,

Plaintiff,

v.

FOLEY & LARDNER LLP and DOES 1
 through 20, inclusive,

Defendants.

CASE NO. **GIC 877641**
**COMPLAINT FOR BREACH
 OF CONTRACT**

Plaintiff alleges the following on information and belief unless otherwise indicated:

1. Plaintiff Vaxiion Therapeutics, Inc. ("Vaxiion") is a pharmaceutical development company incorporated in the state of California.

2. Defendant Foley & Lardner LLP ("Foley") is a law firm operating internationally.

3. Upon information and belief, DOES 1 through 10 are fictitious individuals meant to represent the officers, directors, franchisees, shareholders, founders, owners, agents, servants, employees, sales representatives and/or independent contractors of Defendants who have been involved in the conduct that gives rise to this Complaint, but are heretofore unknown to the Plaintiff.

As these Defendants are identified, Plaintiff shall amend the Complaint to include them.

4. Upon information and belief, XYZ Corporations 11 through 20 are fictitious

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1 corporations meant to represent any additional corporations that have been involved in the conduct
 2 that gives rise to this Complaint, but are heretofore unknown to the Plaintiff. As these Defendants are
 3 identified, Plaintiff shall amend the Complaint to include them.

4 FACTUAL SUMMARY

5 5. Vaxiion's work is based on the use of bacterial minicells as a multi-purpose platform
 6 technology that could prove useful in targeted gene delivery, vaccine delivery, targeted drug delivery,
 7 drug screening, molecular diagnostics, clinical diagnostics, and many other potential applications.

8 6. One of the founders of Vaxiion is a professor and scientist at San Diego State
 9 University, Dr. Roger Sabbadini. Vaxiion was originally incorporated as Mpex Biosciences, Inc. (for
 10 simplicity purposes, the company will be referred to as Vaxiion herein no matter what date is at issue).
 11 Three years of research work in Dr. Sabbadini's laboratory led to the preparation of a 460-claim
 12 provisional patent application entitled "Minicell Compositions and Methods." This was a rather
 13 voluminous patent and eventually Vaxiion would break this provisional application into 23 divisional
 14 applications as suggested by legal counsel.

15 7. Vaxiion retained the law firm of Foley & Lardner to prosecute its original provisional
 16 patent application. Through Foley, the first provisional patent application was filed in the United
 17 States on May 24, 2001 (the "Original Filing Date"). A revised (and expanded) provisional
 18 application was prepared and submitted in the U.S. on February 25, 2002. All of the aforementioned
 19 patent applications maintain a U.S. priority date of May 24, 2001. Two of those divisional
 20 applications were published on November 13, 2003. The publication of these applications results in
 21 the presence of "public domain" art that prevents further applications, either in the U.S. or
 22 internationally, in these areas of invention.

23 8. Under the Paris Cooperation Treaty, an applicant may obtain international protection
 24 starting from the original filing date of the U.S. provisional patent application (i.e., May 24, 2001 in
 25 this case) by filing for an international patent, called a PCT, within one year of filing with the U.S.
 26 patent office (i.e., by May 24, 2002 in this case). In other words, if the PCT application is filed within
 27 one year of the original filing date, then the PCT application is "backdated" to the Original Filing Date
 28 of May 24, 2001. If the PCT application is not filed within one year, however, the priority protection

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1 is lost and the PCT application is not backdated to the Original Filing Date (i.e., May 24, 2001).

2 9. Prior to the due date for Vaxiion's PCT, Vaxiion's then CEO, William Gerhart called
 3 Foley attorney Richard Warburg and reminded him that the application was due and needed to be
 4 filed. Warburg assured Gerhart that all was under control. Gerhart was also assured that Warburg was
 5 personally monitoring the work and would make sure the PCT application would be filed in the
 6 appropriate International office(s) on time.

7 10. Notwithstanding Warburg's assurances, Foley did not file Vaxiion's PCT within the
 8 one year limit, but instead missed the deadline by four days, filing the PCT application on May 28,
 9 2002. As such, the priority date for the PCT application was NOT the Original Filing Date of May
 10 24, 2001, but instead was the Second Filing Date of February 25, 2002. Unfortunately for Vaxiion,
 11 these four days were the difference between getting and losing outside the U.S. because on October
 12 15, 2001, a competitor company called EnGene filed a U.S. patent application covering the same
 13 intellectual property as one of the Vaxiion divisional patent applications involving gene therapy and
 14 minicells. EnGene then timely filed its PCT and was able to claim, in the international arena, with
 15 priority dating back to October 15, 2001, besting Vaxiion's February 25, 2002 priority date. Had
 16 Foley filed the PCT application on time, Vaxiion's international priority date would have been May
 17 24, 2001, almost five months earlier than EnGene's priority date.

18 11. Vaxiion's US patent application concerning gene therapy and minicells was allowed
 19 – in other words confirmed as being novel and commercially viable – on February 27, 2006 with the
 20 title "Eubacterial Minicells and their use as vectors for nucleic acid delivery and expression." On May
 21 9, 2006, the preeminent journal "Vaccine" published a peer reviewed journal article about this
 22 technology further validating its novelty and scientific merit. Vaxiion's now novel and commercially
 23 viable intellectual property protections have been limited to the United States as a direct consequence
 24 of Foley's failure to file the PCT in a timely fashion.

25 12. In 2003, EnGene approached Vaxiion about potential cross-licensing agreements.
 26 Vaxiion conducted its due diligence into EnGene's intellectual property and discovered that it was
 27 the Foley law firm that filed EnGene's October 2002 PCT, the filing of which eliminated Vaxiion's
 28 chances of obtaining international protection. In other words, not only did Vaxiion's own attorneys

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miss a key deadline that gave others a nine-month window to gain priority over Vaxiion, but it was these same attorneys that represented the company that took advantage of this opportunity and now has the intellectual property that Vaxiion lost in the process.

13. Beginning in October 2002, Vaxiion and Foley executed tolling agreements related to liability under these facts. The most recent agreement expires on December 31, 2006.

FIRST CAUSE OF ACTION

Negligence

(Against All Defendants)

14. Plaintiff repeats and alleges each and every allegation made above, fully incorporating those allegations herein.

15. Plaintiff had a meritorious PCT patent application to submit for approval following the submission of its United States patent application.

16. Defendant failed to exercise reasonable care and skill in representing Plaintiff and in submitting and/or prosecuting Plaintiff's PCT patent application. Plaintiff is informed and believes that it would have been awarded the PCT patent had the application been timely submitted. One reason for that belief is that the U.S. patent on the same technology was issued in February 2006.

17. As a proximate result of such negligence, another company, EnGene, applied for and has received a positive office action on the PCT patent regarding Plaintiff's technology.

18. Plaintiff has suffered injury and damages as a direct result of the failures alleged above.

SECOND CAUSE OF ACTION

Dual Representation of Adverse Interests

(Against All Defendants)

19. Plaintiff repeats and alleges each and every allegation made above, fully incorporating those allegations herein.

20. At the same time Defendant was representing Plaintiff in the aforementioned action, Defendant was also retained by an Australian-based company named EnGene. The legal interests of Plaintiff and those of EnGene were actually adverse at the time of the dual representation in that both companies were applicants or potential applicants for the same US and international patent rights. This conflict was not disclosed to the Plaintiff at the time it existed. Plaintiff did not waive – and would not have waived – any such conflict.

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21. As a proximate result of Defendant's dual representation and breach of duty of care and of fiduciary duties to Plaintiff, Plaintiff suffered injury and damage in lost profits and earning capacity Foley's failure to timely file Plaintiff's International patent.

THIRD CAUSE OF ACTION

**Breach of Contract
 (Against All Defendants)**

22. Plaintiff repeats and alleges each and every allegation made above, fully incorporating those allegations herein.

23. A legal services contract was executed between the Plaintiff and the Defendant related to the provision of intellectual property legal services to the Plaintiff.

24. Plaintiff has at all times performed the terms of the legal services contract.

25. Defendants, and each of them, have failed to perform its obligations under the contract in that they failed to timely file the international patent application.

26. Defendants, and each of them, have failed to perform its obligations under the contract by representing interests adverse to Plaintiff while at the same time representing Plaintiff pursuant to the contract of legal representation.

27. Defendants' failure to perform its obligations under the contract has directly damaged Plaintiff through the loss of international profits from the technology.

FOURTH CAUSE OF ACTION

**Interference with Prospective Economic Advantage
 (Against All Defendants)**

28. Plaintiff repeats and alleges each and every allegation made above, fully incorporating those allegations herein.

29. Defendants knew that the Plaintiff possessed a significant economic advantage in obtaining an international patent for this technology.

30. Notwithstanding that knowledge, Defendants either negligently or intentionally deprived Plaintiff of that advantage by successfully prosecuting an international patent application on behalf of EnGene.

31. As a direct result of Defendants' interference, Plaintiff has been damaged and injured through loss of profits from international markets related to this technology.

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32. Defendants' acts alleged above were willful, wanton, malicious, and oppressive, and were undertaken with the intent to defraud, and thereby justify the awarding of exemplary and punitive damages.

FIFTH CAUSE OF ACTION

Constructive Fraud
 (Against All Defendants)

33. Plaintiff repeats and alleges each and every allegation made above, fully incorporating those allegations herein.

34. A fiduciary duty was owed to Plaintiff by the Defendants.

35. The Defendants have concealed material facts from Plaintiff, including but not limited to the fact of Defendants' representation of EnGene and Defendants' submission of EnGene's international patent application. Such concealment violates the Defendants' fiduciary duty to Plaintiff.

36. Plaintiff suffered damage and injury as a result of Defendants' conduct in violation of their fiduciary obligations.

37. Defendants' acts alleged above were willful, wanton, malicious, and oppressive, and were undertaken with the intent to defraud, and thereby justify the awarding of exemplary and punitive damages.

PRAYER FOR RELIEF

Wherefore Plaintiff prays for relief accordingly:

1. General damages according to proof;
2. Special damages according to proof;
3. Punitive damages;

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4. Reasonable attorneys' fees;
5. Costs of suit herein incurred; and
6. Such and other relief as the court may deem proper.

Dated: 12-28, 2006 THORSNES, BARTOLOTTA MCGUIRE

By: Vincent J. Bartolotta, Jr.
VINCENT J. BARTOLOTTA, JR., ESQ.
KAREN R. FROSTROM, ESQ.
BRETT J. SCHREIBER, ESQ.
Attorneys for Plaintiff, VAXTION THERAPEUTICS, INC.

SU MIONS
(CITACION JUDICIAL)

SUM-100

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

Foley & Lardner LLP AND DOES 1 THROUGH 10,
INCLOSIVE

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

20 Inclusive

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

Vaxion Therapeutics, Inc.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le queda más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

Superior Court of San Diego
330 West Broadway

San Diego 92101

CASE NUMBER:

(Número del Caso):

877641

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Vincent J. Bartolotta, Jr., Bar No. 55139 619-236-9363 619-236-9653

Thornes Bartolotta McGuire

2550 5th Ave, Suite 1100

San Diego, CA 92103

DATE: DEC 28 2006

(Fecha)

Clerk, by

(Secretario)

, Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other (specify):

4. ☐ by personal delivery on (date):

Page 1 of 1

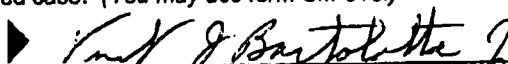
CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Vincent J. Bartolotta, Jr., Bar No. 55139 Thornes Bartolotta McGuire 2550 5th Ave, Suite 1100		FOR COURT USE ONLY 12 FEB 20 P 1:42
San Diego, CA 92103 TELEPHONE NO.: 236-9363 FAX NO.: 236-9653 ATTORNEY FOR (Name): Plaintiff		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input checked="" type="checkbox"/> HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081-6643 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 <input type="checkbox"/> RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200 <input type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649		
CASE NAME: Vaxiion vs. Foley & Lardner LLP		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)	<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)
		CASE NUMBER: 877641 JUDGE: DEPT.:

Items 1-5 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36)	<input type="checkbox"/> Other employment (15) Contract <input checked="" type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02)	<input type="checkbox"/> Other judicial review (39) Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 1800-1812) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☐ is ☒ is not complex under rule 1800 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial post-judgment judicial supervision |
3. Type of remedies sought (check all that apply):
 a. ☒ monetary b. ☐ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify):
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)
- Date: December 28, 2006
- Vincent J. Bartolotta, Jr. 
 (TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

INDEPENDENT CALENDAR CLERK

330 W. Broadway
San Diego, CA 92101

FILE COPY

TO:
VINCENT J. BARTOLOTTA JR. (P)

VAXIION THERAPEUTICS INC

Plaintiff(s)

vs.

FOLEY & LARDNER LLP

Defendant(s)

Case No.: GIC877641

NOTICE OF CASE ASSIGNMENT

Judge: JAY M. BLOOM

Department: 70

Phone: 619-685-6128

COMPLAINT FILED 12/28/06

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT).

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION 11, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil consists of all cases except: Small claims appeals, petitions, and unlawful detainers.

COMPLAINTS: Complaints must be served on all named defendants, and a CERTIFICATE OF SERVICE (SDSC CIV-345) filed within 60 days of filing. This is a mandatory document and may not be substituted by the filing of any other document. (Rule 2.5)

DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than a 15 day extension which must be in writing and filed with the Court.) (Rule 2.6)

DEFAULT: If the defendant has not generally appeared and no extension has been granted, the plaintiff must request default within 45 days of the filing of the Certificate of Service. (Rule 2.7)

THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO LITIGATION, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. MEDIATION SERVICES ARE AVAILABLE UNDER THE DISPUTE RESOLUTION PROGRAMS ACT AND OTHER PROVIDERS. SEE ADR INFORMATION PACKET AND STIPULATION.

YOU MAY ALSO BE ORDERED TO PARTICIPATE IN ARBITRATION PURSUANT TO CCP 1141.10 AT THE CASE MANAGEMENT CONFERENCE. THE FEE FOR THESE SERVICES WILL BE PAID BY THE COURT IF ALL PARTIES HAVE APPEARED IN THE CASE AND THE COURT ORDERS THE CASE TO TO ARBITRATION PURSUANT TO CCP 1141.10. THE CASE MANAGEMENT CONFERENCE WILL BE CANCELLED IF YOU FILE FORM SDSC CIV-359 PRIOR TO THAT HEARING.

ALSO SEE THE ATTACHED NOTICE TO LITIGANTS.

CERTIFICATE OF SERVICE

I certify that I am not a party to the above-entitled case; on the date shown below, I served this notice on the parties shown by personally handing it to the attorney or their personal representative at **SAN DIEGO** California.

DATED: 12/28/06

BY: CLERK OF THE SUPERIOR COURT

Robert E. Gooding, Jr. (SBN 50617)
 Scott B. Garner (SBN 156728)
 Ryan E. Lindsey (SBN 235073)
 HOWREY LLP
 2020 Main Street, Suite 1000
 Irvine, California 92614
 Telephone: (949) 721-6900
 Facsimile: (949) 721-6910
 Email: goodingr@howrey.com
 Email: garners@howrey.com
 Email: lindseyr@howrey.com

Kenneth S. Klein (SBN 129172)
 Foley & Lardner LLP
 402 West Broadway, Suite 2100
 San Diego, California 92101
 Telephone: (619) 234-6655
 Facsimile: (619) 234-3510
 Email: kklein@foley.com

Attorneys for Defendant Foley & Lardner LLP

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SAN DIEGO

VAXIIION THERAPEUTICS, INC.,

Plaintiff,

vs.

FOLEY & LARDNER LLP and DOES 1 through
 20, inclusive,

Defendants.

) Case No. GIC877641

) Assigned to Judge Jay M. Bloom
) Dept. 70

) **GENERAL DENIAL OF DEFENDANT**
) **FOLEY & LARDNER LLP**

) Complaint Filed: December 28, 2006

1 Defendant Foley & Lardner LLP ("Foley & Lardner") answers Plaintiff Vaxiion Therapeutics,
 2 Inc.'s ("Plaintiff") unverified Complaint on its own behalf and on behalf of no other Defendant as
 3 follows:

4 **GENERAL DENIAL**

5 Pursuant to California Civil Procedure Code section 431.30(d), Foley & Lardner denies
 6 generally each and every allegation of the Complaint.

7 **AFFIRMATIVE DEFENSES**

8 As separate and affirmative defenses to the Complaint, and each cause of action stated therein,
 9 Foley & Lardner alleges as follows:

10 **FIRST AFFIRMATIVE DEFENSE**

11 (Failure to State a Claim)

12 Neither the Complaint nor any purported cause of action alleged by Plaintiff therein states facts
 13 sufficient to constitute a cause of action against Foley & Lardner.

14 **SECOND AFFIRMATIVE DEFENSE**

15 (Application Not Impacted by EnGene Application)

16 The examination, claim scope, validity, enforceability, and value (if any) of Vaxiion's PCT
 17 application and its associated non-U.S. patents or patent applications have not, would not, and cannot
 18 be negatively impacted by the filing of EnGene's PCT application.

19 **THIRD AFFIRMATIVE DEFENSE**

20 (Products Not Impacted by EnGene Application)

21 The research and development, manufacturing, sale, offering for sale, distribution, marketing,
 22 importation, and exportation of Vaxiion's products, if any, have not, would not, and cannot be
 23 negatively impacted by the filing of EnGene's PCT application.

24 **FOURTH AFFIRMATIVE DEFENSE**

25 (No Conflict with EnGene Technology or Application)

26 Vaxiion's technologies and patent applications at issue do not present any legal or actual
 27 conflict with EnGene's technologies and patent applications at issue.

FIFTH AFFIRMATIVE DEFENSE

(Statue of Limitations)

Plaintiff action, and each alleged cause of action, is barred by (a) the applicable California statute of limitations including, but not limited to, California Civil Procedure Code sections 337, 338, 340.6, and 343, and (b) any applicable statute of limitation and/or statute of repose.

SIXTH AFFIRMATIVE DEFENSE

(Laches)

Plaintiff unreasonably and without good cause delayed in bringing this action. Foley & Lardner was prejudiced as a direct and proximate result of Plaintiff unreasonable delay. Thus, this action is barred by laches.

SEVENTH AFFIRMATIVE DEFENSE

(Comparative Negligence)

Plaintiff was negligent in and about the matters alleged in the first and fourth causes of action of the Complaint; this negligence proximately caused, in whole or in part, the damages alleged in the Complaint. In the event Plaintiff is entitled to any damages, the amount of these damages should be reduced by the comparative fault of Plaintiff.

EIGHTH AFFIRMATIVE DEFENSE

(Waiver)

Plaintiff, by reason of its conduct, waived its right to assert any of the purported claims in the Complaint, and said waiver bars the relief requested.

NINTH AFFIRMATIVE DEFENSE

(Estoppel)

Plaintiff is estopped by reason of its conduct from asserting any of the causes of action alleged in the Complaint.

TENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

Each and every claim in the complaint is barred under the doctrine of unclean hands because Plaintiff's own improper actions caused the alleged damages.

ELEVENTH AFFIRMATIVE DEFENSE

(Assumption of Risk)

Plaintiff assumed the risks associated with the conduct alleged in its first and fourth causes of action.

TWELVTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

Plaintiff failed to exercise due diligence to mitigate its loss, injury, or damages, if any. Accordingly, the amount of damages to which Plaintiff is entitled, if any, should be reduced by the amount of damages which otherwise would have been mitigated.

THIRTEENTH AFFIRMATIVE DEFENSE

(No Entitlement to Punitive Damages)

Neither the Complaint nor any purported cause of action alleged therein against Foley & Lardner states sufficient facts to entitle Plaintiff to an award of punitive damages against Foley & Lardner.

FOURTEENTH AFFIRMATIVE DEFENSE

(Punitive Damages – Due Process)

The imposition of punitive damages in this matter would deprive Foley & Lardner of its property without due process of law under the United States Constitution and the California Constitution.

FIFTEENTH AFFIRMATIVE DEFENSE

(Punitive Damages – Burden of Proof)

The imposition of any punitive damages in this matter would constitute a criminal fine or penalty and, therefore, if awarded on less than a showing of beyond a reasonable doubt, would be in violation of the United States Constitution and the California Constitution.

WHEREFORE, Foley & Lardner prays:

- (1) That Plaintiff take nothing by its Complaint;
- (2) That Judgment be entered in favor of Foley & Lardner;
- (3) That Foley & Lardner be dismissed from this suit;
- (4) For recovery of Foley & Lardner's cost of suit; and
- (5) For such other and further relief as the Court deems just and proper.

Dated: February 9, 2007

HOWREY LLP

By: 

Scott B. Garner
Attorneys for Defendant
Foley & Lardner LLP

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF ORANGE

) ss.:
)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 2020 Main Street, Suite 1000, Irvine, California 92614.

On February 9, 2007, I served on the interested parties in said action the within:

GENERAL DENIAL OF DEFENDANT FOLEY & LARDNER LLP

by placing a true copy thereof in a sealed envelope(s) addressed as stated below.

Vincent J. Bartolotta, Jr.
Karen R. Frostrom
Brett J. Schreiber
THORSNES BARTOLOTTA MCGUIRE
2550 Fifth Ave., 11th Floor
San Diego, CA 92103

Facsimile No.: (619) 236-9653

☒ (MAIL) I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Overnite Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 9, 2007, at Irvine, California.

Shawn Beem
(Type or print name)


(Signature)

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State, number, and address):

FOR COURT USE ONLY

Scott B. Garner (SBN 156728)

HOWREY LLP

2020 Main Street, Suite 1000

Irvine, CA 92614

TELEPHONE NO.: (949) 721-6900

FAX NO.: (949) 721-6910

ATTORNEY FOR (Name): Defendant Foley & Lardner

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

STREET ADDRESS: 220 W. Broadway

MAILING ADDRESS: P.O. Box 122725

CITY AND ZIP CODE: San Diego, CA 92101-3509

BRANCH NAME: Central Division

CASE NAME: Vaxiion Therapeutics, Inc. v. Foley & Lardner LLP, et al.

CIVIL CASE COVER SHEET—Counter Complex Case Designation

☒ Unlimited (Amount demanded exceeds \$25,000) ☐ Limited (Amount demanded is \$25,000 or less)

☒ Counter ☐ Joinder

Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

CASE NUMBER:
GIC 877641

JUDGE: Jay M. Bloom

DEPT: 70

Items 1–6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort

- ☐ Auto (22)
☐ Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

- ☐ Asbestos (04)
☐ Product liability (24)
☐ Medical malpractice (45)
☐ Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort

- ☐ Business tort/unfair business practice (07)
☐ Civil rights (08)
☐ Defamation (13)
☐ Fraud (16)
☐ Intellectual property (19)
☒ Professional negligence (25)
☐ Other non-PI/PD/WD tort (35)

Employment

- ☐ Wrongful termination (36)
☐ Other employment (15)

Contract

- ☐ Breach of contract/warranty (06)
☐ Collections (09)
☐ Insurance coverage (18)
☐ Other contract (37)

Real Property

- ☐ Eminent domain/Inverse condemnation (14)
☐ Wrongful eviction (33)
☐ Other real property (26)

Unlawful Detainer

- ☐ Commercial (31)
☐ Residential (32)
☐ Drugs (38)

Judicial Review

- ☐ Asset forfeiture (05)
☐ Petition re: arbitration award (11)
☐ Writ of mandate (02)
☐ Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)

- ☐ Antitrust/Trade regulation (03)
☐ Construction defect (10)
☐ Mass tort (40)
☐ Securities litigation (28)
☐ Environmental/Toxic tort (30)
☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment

- ☐ Enforcement of judgment (20)

Miscellaneous Civil Complaint

- ☐ RICO (27)
☐ Other complaint (not specified above) (42)

Miscellaneous Civil Petition

- ☐ Partnership and corporate governance (21)
☐ Other petition (not specified above) (43)

2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. ☐ Large number of separately represented parties d. ☐ Large number of witnesses
b. ☒ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. ☐ Substantial amount of documentary evidence f. ☐ Substantial postjudgment judicial supervision

3. Type of remedies sought (check all that apply):

- a. ☒ monetary b. ☐ nonmonetary; declaratory or injunctive relief c. ☒ punitive

4. Number of causes of action (specify): 5

5. This case ☐ is ☒ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: February 9, 2007

SCOTT B. GARNER

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers

If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 5 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. You do not need to submit a cover sheet with amended papers. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Collections Cases

In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort

Auto (22)—Personal Injury/Property Damage Wrongful Death
Uninsured Motorist (46) *(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)
Asbestos Property Damage
Asbestos Personal Injury/Wrongful Death
Product Liability *(not asbestos or toxic/environmental)* (24)
Medical Malpractice (45)
Medical Malpractice—Physicians & Surgeons
Other Professional Health Care Malpractice
Other PI/PD/WD (23)
Premises Liability (e.g., slip and fall)
Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
Intentional Infliction of Emotional Distress
Negligent Infliction of Emotional Distress
Other PI/PD/WD

Non-PI/PD/WD (Other) Tort

Business Tort/Unfair Business Practice (07)
Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
Defamation (e.g., slander, libel) (13)
Fraud (16)
Intellectual Property (19)
Professional Negligence (25)
Legal Malpractice
Other Professional Malpractice *(not medical or legal)*
Other Non-PI/PD/WD Tort (35)

Employment

Wrongful Termination (36)
Other Employment (15)

Contract

Breach of Contract/Warranty (06)
Breach of Rental/Lease
Contract *(not unlawful detainer or wrongful eviction)*
Contract/Warranty Breach—Seller Plaintiff *(not fraud or negligence)*
Negligent Breach of Contract/Warranty
Other Breach of Contract/Warranty
Collections (e.g., money owed, open book accounts) (09)
Collection Case—Seller Plaintiff
Other Promissory Note/Collections Case
Insurance Coverage *(not provisionally complex)* (18)
Auto Subrogation
Other Coverage
Other Contract (37)
Contractual Fraud
Other Contract Dispute

Real Property

Eminent Domain/Inverse Condemnation (14)
Wrongful Eviction (33)
Other Real Property (e.g., quiet title) (26)
Writ of Possession of Real Property
Mortgage Foreclosure
Quiet Title
Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer

Commercial (31)
Residential (32)
Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)*

Judicial Review

Asset Forfeiture (05)
Petition Re: Arbitration Award (11)
Writ of Mandate (02)
Writ—Administrative Mandamus
Writ—Mandamus on Limited Court Case Matter
Writ—Other Limited Court Case Review
Other Judicial Review (39)
Review of Health Officer Order
Notice of Appeal—Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)
Construction Defect (10)
Claims Involving Mass Tort (40)
Securities Litigation (28)
Environmental/Toxic Tort (30)
Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment

Enforcement of Judgment (20)
Abstract of Judgment (Out of County)
Confession of Judgment *(non-domestic relations)*
Sister State Judgment
Administrative Agency Award *(not unpaid taxes)*
Petition/Certification of Entry of Judgment on Unpaid Taxes
Other Enforcement of Judgment Case

Miscellaneous Civil Complaint

RICO (27)
Other Complaint *(not specified above)* (42)
Declaratory Relief Only
Injunctive Relief Only *(non-harassment)*
Mechanics Lien
Other Commercial Complaint Case *(non-tort/non-complex)*
Other Civil Complaint *(non-tort/non-complex)*

Miscellaneous Civil Petition

Partnership and Corporate Governance (21)
Other Petition *(not specified above)* (43)
Civil Harassment
Workplace Violence
Elder/Dependent Adult Abuse
Election Contest
Petition for Name Change
Petition for Relief from Late Claim
Other Civil Petition

PROOF OF SERVICE

STATE OF CALIFORNIA

)

ss.:

COUNTY OF ORANGE

)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 2020 Main Street, Suite 1000, Irvine, California 92614.

On February 9, 2007, I served on the interested parties in said action the within:

CIVIL COVER SHEET - COUNTER

by placing a true copy thereof in a sealed envelope(s) addressed as stated below.

Vincent J. Bartolotta, Jr.
 Karen R. Frostrom
 Brett J. Schreiber
 THORSNES BARTOLOTTA MCGUIRE
 2550 Fifth Ave., 11th Floor
 San Diego, CA 92103

Facsimile No.: (619) 236-9653

☒ (MAIL) I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ (OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Overnite Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 9, 2007, at Irvine, California.

Shawn Beem
 (Type or print name)


 (Signature)

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF ORANGE

)
)
ss.:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 2020 Main Street, Suite 1000, Irvine, California 92614.

On February 9, 2007, I served on the interested parties in said action the within:

NOTICE OF REMOVAL OF CIVIL ACTION TO THE UNITED STATES DISTRICT COURT [28 U.S.C. §§ 1441 AND 1338]

by placing a true copy thereof in a sealed envelope(s) addressed as stated below and causing such envelope(s) to be deposited in the U.S. Mail at Irvine, California.

Vincent J. Bartolotta, Jr.
Karen R. Frostrom
Brett J. Schreiber
THORSNES BARTOLOTTA MCGUIRE
2550 Fifth Ave., 11th Floor
San Diego, CA 92103

Facsimile No.: (619) 236-9653

☒ (MAIL) I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ (OVERNIGHT DELIVERY) by depositing in a box or other facility regularly maintained by Overnite Express, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for and causing such envelope(s) to be delivered by said express service carrier.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on February 9, 2007, at Irvine, California.

Shawn Beem
(Type or print name)


(Signature)

ORIGINAL

1 Robert E. Gooding, Jr. (SBN 50617)
Scott B. Garner (SBN 156728)
2 Ryan E. Lindsey (SBN 235073)
HOWREY LLP
3 2020 Main Street, Suite 1000
Irvine, California 92614
4 Telephone: (949) 721-6900
Facsimile: (949) 721-6910
5 Email: goodingr@howrey.com
Email: garners@howrey.com
6 Email: lindseyr@howrey.com

7 Kenneth S. Klein (SBN 129172)
Foley & Lardner LLP
8 402 West Broadway, Suite 2100
San Diego, California 92101
9 Telephone: (619) 234-6655
Facsimile: (619) 234-3510
10 Email: kklein@foley.com

11 Attorneys for Defendant Foley & Lardner LLP

12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA
14

15 VAXIIION THERAPEUTICS, INC.,

16 Plaintiff,

17 vs.

18 FOLEY & LARDNER LLP and DOES 1 through
20, inclusive,

19 Defendants.
20

'07 CV 280 IEG (RBB)
Case No. _____

CERTIFICATE OF SERVICE OF NOTICE
TO ADVERSE PARTY OF REMOVAL OF
CIVIL ACTION TO THE UNITED STATES
DISTRICT COURT

[28 U.S.C. § § 1441 AND 1338]

[SDSC Case No. GIC877641]

1 I, Shawn Beem, certify and declare as follows:

2 I am over the age of 18 years and not a party to this action. My business address is Howrey
3 LLP, 2020 Main Street, Suite 1000, Irvine, California 92614-8200, which is located in the city, county
4 and state where the mailing described below took place.

5 On February 9, 2007, I deposited in the United States Mail at Irvine, California, a copy of the
6 Notice to Adverse Party of Removal of Civil Action to the United States District Court dated
7 February 9, 2007, a copy of which (without Exhibits) is attached to this Certificate.

8 I declare under penalty of perjury that the foregoing is true and correct.

9
10 Dated: February 9, 2007

11
12 By:  _____

13
14 20214599v1

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE)

ss.:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 2020 Main Street, Suite 1000, Irvine, California 92614.

On February 9, 2007, I served on the interested parties in said action the within:

**CERTIFICATE OF SERVICE OF NOTICE TO ADVERSE PARTY OF REMOVAL OF
CIVIL ACTION TO THE UNITED STATES DISTRICT COURT
[28 U.S.C. § § 1441 and 1338]**

by placing a true copy thereof in a sealed envelope(s) addressed as stated below and causing such envelope(s) to be deposited in the U.S. Mail at Irvine, California.

Vincent J. Bartolotta, Jr.
Karen R. Frostrom
Brett J. Schreiber
THORSNES BARTOLOTTA MCGUIRE
2550 Fifth Ave., 11th Floor
San Diego, CA 92103

Facsimile No.: (619) 236-9653

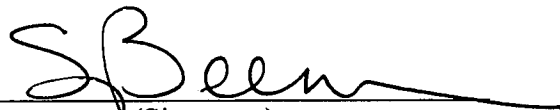
☒ (MAIL) I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ (OVERNIGHT DELIVERY) by depositing in a box or other facility regularly maintained by Overnite Express, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated above, with fees for overnight delivery paid or provided for and causing such envelope(s) to be delivered by said express service carrier.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on February 9, 2007, at Irvine, California.

Shawn Beem
(Type or print name)


(Signature)

JS 44 (Rev. 11/04)

The JS 44 civil cover sheet and the information contained on it neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

VAXIION THERAPEUTICS, INC.

DEFENDANTS

FOLEY & LARDNER LLP

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed San Diego
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Vincent J. Bartolotta, Jr.
Karen R. Frostrom
THORSNES BARTOLOTTA MCGUIRE
2550 Fifth Ave., 11th Floor
San Diego, CA 92103
Tel: (619) 236-9363

Attorneys (If Known)

Robert E. Gooding, Jr.
Scott B. Garner
HOWREY LLP
2020 Main St., Suite 1000
Irvine, CA 92614
Tel: (949) 721-6900

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 PTF ☐ 1 DEF
Incorporated or Principal Place of Business In This State ☐ 4 PTF ☐ 4 DEF
Citizen of Another State ☐ 2 PTF ☐ 2 DEF
Incorporated and Principal Place of Business In Another State ☐ 5 PTF ☐ 5 DEF
Citizen or Subject of a Foreign Country ☐ 3 PTF ☐ 3 DEF
Foreign Nation ☐ 6 PTF ☐ 6 DEF

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
☒ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 USC 1338(a)

Brief description of cause:

Legal malpractice suit alleging negligence based on federal patent law.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE February 9, 2007

SIGNATURE OF ATTORNEY OF RECORD

Scott B. Garner

FOR OFFICE USE ONLY

RECEIPT # 134824 AMOUNT \$350 APPLYING IFP JUDGE MAG. JUDGE

See 2/9/07

Authority For Civil Cover Sheet

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES
DISTRICT COURT
Southern District of California
San Diego Division

134824 - A3
February 9, 2007

Code	Case #	Qty	Amount
CV086900	3-07-CV-0200		60.00 CH
Judge	GONZALEZ		
CV086400			100.00 CH
CV510000			190.00 CH
Total ->			350.00

FROM: CIVIL FILING
VAXION THERAPEUTICS INC V
FOLEY ET AL
BCN 58526 CH

FILED

2007 FEB 12 PM 12:39

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. NAPOLEON A. JONES, JR.)

Rm DEPUTY

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
JUAN HERNANDEZ CABRERA)
Defendant.)

Case No 06 cr 0797 J

**ORDER CONTINUING
SENTENCING HEARING**

Good cause appearing;

IT IS HEREBY ORDERED that the sentencing hearing for
defendant, Juan Maurillo Hernandez Cabrera, shall be continued from
February 12, 2007 at 8:15 a.m. to March 12, 2007 at 8:15 a.m.

SO ORDERED.

Dated: 2.9.07

[Signature]
HON. NAPOLEON A. JONES, JR.
United States District Court Judge